109 I.A. 2nd 80
NO. 68-32

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

HAROLD A. WITHERBY, MARGARET WITHERBY and TONY HEINE, Plaintiffs-Appellants, vs. DANNY RAY BIERMAN, a Minor, by his Father and Next Friend, RALPH BIERMAN, and RALPH BIERMAN, Defendants-Appellees.	Appeal from the Circuit Court of Randolph County. Honorable Carl H. Becker, Judge Presiding.

Goldenhersh, P. J.

Plaintiffs appeal from the judgment of the Circuit Court of Randolph County entered upon a jury verdict in plaintiffs' action to recover for damages to their property as the result of a fire allegedly caused by defendants' negligence.

The evidence shows that the plaintiffs, Harold A. Witherby and Margaret Witherby, owned a one story brick mercantile building in Steelville. The building was leased to and occupied by the plaintiff, Tony Heine, in the operation of a Western Auto Supply Store. On May 23, 1965, a fire damaged the building and destroyed much of Heine's inventory.

The defendant, Ralph Bierman, operated a restaurant near plaintiffs' premises and the defendant, Danny Bierman, is his son, who at the time of the occurrence was 11 years of age.

The complaint charges Danny with various acts of negligence which caused the fire and charged defendant, Ralph Bierman, with carelessly and negligently permitting his son to use fire and combustible materials near plaintiffs' premises, failing to properly

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supervise him and failing to warn him of the hazards of his misconduct.

At the close of the plaintiffs' case the trial court directed a verdict in favor of defendant, Ralph Bierman, and the jury returned a verdict in favor of Danny, and against the plaintiffs.

Plaintiffs, as grounds for reversal, argue that the court erred in instructing the jury with respect to plaintiffs' contributory negligence, erred in permitting defendants' counsel, in closing argument, to argue the issue of plaintiffs' contributory negligence, and erred in its rulings on the admissibility of certain evidence.

The instruction complained of is defendants' instruction No. 3, in the form of I.P.I. 10.03. Plaintiffs' "issues" instruction (I.P.I. 20.01) advised the jury that plaintiffs claimed their property was damaged while they were in the exercise of ordinary care; defendants tendered, and the court gave, without objection, an instruction in the form of I.P.I. 21.02 which advised the jury that plaintiffs must prove they were in the exercise of ordinary care. Plaintiffs did not move for a directed verdict on the issue of contributory negligence, and their own instruction informed the jury that it was an issue in the case. There was no objection to the portion of the argument now complained of. Under the circumstances the court did not err in giving defendants' instruction No. 3 and the error alleged with respect to defendants' closing argument is not preserved for review.

Plaintiffs contend that the trial court erred in admitting testimony as to plaintiff Heine's habits and reputation. We have examined the testimony complained of and do not find that it purports to show plaintiff Heine's habits and reputation. The testimony did show that there was debris of various types in back of the store.

The only objection made to the testimony was properly overruled, and the grounds upon which plaintiffs base their contention of error in this court were not included therein and were, therefore, waived. Hyatt v. Cox, 57 Ill. App. 2d 293.

We find no reversible error and the judgment of the Circuit Court of Randolph County is affirmed.

Judgment Affirmed.

Concur: George J. Moran

Concur: Edward C. Eberspacher

PUBLISH ABSTRACT ONLY

FILED
APR 9 - 1969
CLERK PRO TEMPORE APPELLATE COURT
FIFTH DISTRICT

No. 68-15 **109 I.A. 2nd 91**

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

RADIO CORPORATION OF AMERICA, a Delaware Corporation, Plaintiff-Appellant, vs. CHARLES M. SMITH, Doing Business as CHARLES M. SMITH TRUCK SERVICE, Defendant-Appellee.	Appeal from Circuit Court, Franklin County, Illinois. Honorable Randall S. Quindry, Judge Presiding.

EBERSPACHER, J.

This action was brought by the plaintiff, Radio Corporation of America, a corporation, to recover rentals and other charges, including the value of certain equipment alleged to be due from the defendant, Charles M. Smith, doing business as Charles M. Smith Truck Service, under the terms of three separate lease agreements covering mobile communications equipment. The trial court sitting without a jury entered a judgment for the plaintiff in the sum of $1,480.36. The plaintiff has appealed from that judgment.

It appears from the record that in the year 1960 plaintiff and defendant entered into three separate agreements each of a different date and each leasing to the defendant certain mobile communications equipment. The agreements each provided for a leasing period of seven years and an agreed monthly rental. The agreements further provided that the defendant should have the option to purchase the leased equipment at the end of the term and provided the manner in which the purchase price would be determined. The agreements also provided that the lessor might declare the agreements terminated in the event of a default in payment of the agreed rental and provided for certain termination charges in such event. The agreements also contained an agreed value for each of the various items of equipment.

The defendant testified that he also paid certain installation charges, the cost of freight and shipping and also purchased from a local dealer an antenna to preclude delay in installation. The defendant further testified that other than one piece of equipment that he has not returned any of the leased equipment to the plaintiff, that he still retains part of the equipment and is using it, and that other items of the equipment were left at the place of business of a radio repairman. The testimony revealed that the defendant had previously refused to surrender the equipment to various persons sent by the plaintiff to repossess the equipment and on August 30, 1962, the plaintiff terminated the agreements for non-payment of rent pursuant to the terms of the agreement. Subsequent efforts to re-negotiate the agreements failed.

The defendant asserted both in his pleadings and in his testimony during the trial that an employee of A & E Electronics, the firm that had installed the equipment, had represented to him that they were an agent of the plaintiff and that the alleged agent instructed him to withhold the rental payments until the equipment was properly installed and was functioning correctly. The defendant further testified that the equipment had never worked properly. However, there was no testimony as to the specific nature of the malfunction.

The trial court in entering its judgment appears to have denied the plaintiff's prayer for past rentals and has based the amount of the judgment on the value of the equipment retained by the defendant, rendering judgment for plaintiff in the amount of $1,480.36.

Plaintiff plead the execution of three agreements, and incorporated them into its complaint in its first three paragraphs: Its complaint alleged non-payment of the monthly rentals, shipping charges, installation charges, termination charges, all as provided in the agreements, and that defendant was also indebted to plaintiff for the agreed value of unreturned equipment as provided in the agreements. Incorporated in the complaint was an itemized account showing the itemized charges claimed, and which showed the amount owed to total $8,345.12, after allowance for the credit of $1,726.32 for payments received. The complaint prayed judgment for $8,345.12.

Defendant, by his answer, admitted the execution of the agreements and denied all other allegations of the complaint, except his residence in Franklin County. With his answer he filed affirmative defenses, the first paragraph of which alleges that defendant made the monthly payments "until such equipment totally failed to perform" and that defendant's declination to make further payments "was at the direction and command of" an agent of plaintiff. His next allegation (2nd paragraph) was that he had the unsatisfactory and unuseable equipment and desired plaintiff to get it, that it was of no benefit to him, and that the $2,000.00 which he had paid represented more than the use of benefit of "such faulty, defective, inadequate, unoperable and deficient equipment". Plaintiff moved to strike the affirmative defenses, which was overruled as to paragraph 1, and sustained as to the rest of the affirmative defenses. Plaintiff then filed a reply to the remaining affirmative defense, in which plaintiff denied the allegations of paragraph 1 of the affirmative defenses, and alleged that defendant had relied on no warranty, either express or implied and that defendant had failed to allege the date he discovered the defective condition of the equipment, nor did defendant allege any date of notice of a breach of warranty.

Obviously a breach of warranty was not a part of this case, and we have here no cross appeal from the order striking part of the affirmative defense. A great part of plaintiff's brief is devoted to the question of breach of warranty while defendant by his brief ignores this question and rests entirely on the agency question. Suffice it to say, from our examination of the record, properly pleaded breach of warranty is not an issue; the record does not disclose a breach of warranty proven, nor is there evidence of a timely notice of a breach of warranty. The latter waives such defense. Mayflower Sales Co. v. Frazier, 325 Ill. App. 314, 317-318, 60 N.E. 2d 123. Krone Die Casting Co. v. Do Ray Lamp Co., 297 Ill. App. 602, 614-616, 18 N.E. 2d 100.

The gist of the plaintiff's argument as it relates to the agency issue is that the burden of proof rested upon the defendant in proving that the electronics firm was an agent of the plaintiff and as such had authority to waive the express provisions

in the lease agreements as to the monthly rentals and that the trial court erred in admitting the testimony of the defendant as to certain declarations made by employees of the electronics firm for the purpose of proving the agency between the electronics firm and the plaintiff.

No citation is necessary for the proposition that the party who asserts an agency relationship has the burden of proving that such relationship existed. It is equally clear that persons dealing with an assumed agent are bound at their peril to ascertain not only the fact of the agency but the extent of the agent's authority. Paine vs. Sheridan Trust & Savings Bank, 342 Ill. 342, 174 N.E. 368; Foster vs. Graf, 287 Ill. 559, 122 N.E. 845. In reference to the present case it is equally well settled that where the existence of an agency is an issue in a case and where the alleged principal is a party, the mere statements of the agent made out of the presence of the principal and not subsequently approved by him are not admissible to establish the existence of such relationship. This is in recognition of the rule that the principal is the source of power and that the agent's authority can be proved only by tracing it to that source in some word or act of the alleged principal, City of Evanston vs. Piotrowicz, 20 Ill. 2d 512, 170 N.E. 2d 569 (1961).

In the present case the Court admitted the defendant's testimony over the objection of the plaintiff that an employee of A & E Electronics, the company that installed the equipment here in issue, represented to the defendant that he was an agent of the plaintiff. There is no evidence that the plaintiff subsequently ratified or approved such statements or was even aware of them. The only other evidence in the record relating to the alleged agency relationship is the testimony of one of the plaintiff's employees in which he testified that the plaintiff has in the past issued franchises for authorization for selling its equipment to various agents; that these agents would be paid an agreed amount of commission for making the sale of the equipment; and that at the date of the trial the A & E Electronics was not such an agent. The defendant argues that from this evidence it may be inferred that in the past, or more particularly on the dates of the transactions between the parties,

that an agency relationship existed between the plaintiff and the A & E Electronics Company. In our opinion the most that could be inferred from such testimony would be that the A & E Electronics Company was an agent of the plaintiff with authority to sell its equipment. Such testimony is certainly not proof of the A & E Electronics Company's authority to waive express provisions in the lease agreements entered into between the plaintiff and the defendant.

The agency that is relied upon by defendant is a claimed authority of the agent to waive written provisions in the contract. Each of the written contracts provided:

> "No agreement altering, modifying or extending the terms of this agreement shall be valid unless in writing duly signed by the parties or by their duly authorized representatives."

No evidence was presented of any such written agreement altering, modifying or extended the terms of the original agreements. In Singer Mfg. Co. v. Leeds, 48 Ill. App. 297, 300, the Court held that an agent did not have authority to waive terms in the written contract and stated as follows:

> "It is urged, however, that the proof shows a subsequent agreement waiving this clause. The contract in terms provided that no outside agreement differing therefrom should be made unless confirmed by the agent in Chicago. This was a clear negation of the power of the agent, Dewell, who presented the contract to the plaintiff, to make any such agreement.
>
> "It would not do to say that Dewell might, by his own declaration, establish his authority to set aside a clause of such importance. While it is true the company might waive this provision, the proof of waiver can not rest upon the bare assertion of an agent in conflict with the express terms of the writing, thereby overriding a provision which clearly showed he had not the power he assumed to have. To permit such proof would open a wide door to fraud. . . . . ."

The Court did not enter judgment for the plaintiff for the past rentals due, apparently either on the theory that the plaintiff through its agent had waived these payments or on the theory that the plaintiff had breached its warranty to the defendant. When a defendant pleads a breach of warranty as an affirmative defense, such defendant has the burden of proving both the warranty and the breach by a preponderance of the evidence. Frazier v. Allison, 315 Ill. App. 253, 257, 42 N.E. 2d 967.

Inasmuch as we have found that the defendant has failed in its burden of proving the agency relationship and defendant also failed to allege and prove a breach of warranty, we find that we have no alternative but to affirm the judgment for plaintiff and remand the cause for a proper determination of damages.

Affirmed and remanded with directions.

CONCUR: /S/ Joseph H. Goldenhersh

CONCUR: /S/ George J. Moran

PUBLISH IN ABSTRACT ONLY.

FILED
APR 3 - 1969
CLERK, U.S. COURT OF APPEALS
FIFTH CIRCUIT

109 I.A. 2nd # 277 1

No. 68-190

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

JOE E. EASTABROOKS,

Plaintiff-Appellee,

vs.

EVA RAVLIN and
AURORA NATIONAL BANK,

Defendants-Appellants.

Appeal from the Circuit Court for the Sixteenth Judicial Circuit, Kane County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

Plaintiff alleged an oral contract for the painting of defendant Eva Ravlin's home. Relief was sought for foreclosure of a mechanics lien and for "other appropriate relief." After a hearing before the court, a judgment was entered for plaintiff in the amount of $535 and attorneys' fees were assessed as costs in the amount of $125.

Defendant's appeal raises the questions of sufficiency of proof in terms of the cause of action stated in the complaint, and the authority to award attorneys' fees.

The complaint sets forth that on April 5, 1960 the parties entered into an oral contract for the painting for the sum of $568; that the work was completed on or about July 20, 1960, became a part of the premises, and that defendant did not pay upon demand. The prayer is for an accounting, a decree of a mechanics lien and "for other appropriate relief."

109 1.A.

The answer admits the oral agreement but alleges poor workmanship.

The proof as it related to the agreement, briefly summarized, set forth an agreement to do the work on a time and material basis but at a price not to exceed $600, (or not to exceed $570, according to defendant's testimony.) Plaintiff testified that he had no records but that he had sent her a bill for $568, and that "must be" the correct amount "for time and material." He introduced a letter from his attorney to defendant, dated March 13, 1961 demanding the sum of $535.

A substantial portion of the evidence was made up of conflicting testimony as to the performance of the work.

Defendant's argument that the proof was insufficient to establish the contract for time and material would have been persuasive if it had not been waived. However, having answered that a contract had been entered into for the fixed price of $568 and having tried the case in the court below on the theory of improper performance of the work, defendant may not now pursue a substantially different approach. The point was not raised below by specific objection at the trial and no post-trial motion was filed. We should not, on the circumstances of this case, consider different theories or new questions on appeal to reverse a judgment when proof might have been offered to refute them had they been presented at the trial. Hux v. Raben, 38 Ill. 2d 223, 225 (1967).

It is argued that there was no basis in the proofs for the finding that $535 was due. Obviously the court considered that the earlier collection letter was an admission that a credit was due to the defendant.

On the question of the performance of the work, we do not find the judgment below against the manifest weight of the evidence. We affirm the judgment for $535.

Defendant argues that, on the pleadings, the court could only have decreed a mechanics lien and was without power to consider the matter as a "small claim" and to enter judgment on the contract. The lien, however, is a cumulative remedy, and to deny it does not deprive a party of the right to recover on the contract. Pugh Co. v. Wallace, 198 Ill. 422, 430-431 (1902). The pleadings were sufficient to support the judgment on the oral contract upon denial of the mechanics lien when it appeared that the property had been sold prior to suit.

The award of attorneys' fees must be reversed however. No contractual or statutory authority was offered to support the granting of attorneys' fees, and without such basis it was improper to assess such fees to the losing party. Ritter v. Ritter, 381 Ill. 549, 553 (1943). The theory, advanced by plaintiff for the first time on this appeal, that Section 41 of the Civil Practice Act (Ill. Rev. Stat. 1967, Ch. 110, Sec. 41) supports the award of attorneys' fees, must be rejected. The fees were arbitrarily assessed without affording the plaintiff a hearing on the amount of fees as required under Section 41, supra. Adams v. Silfen, 342 Ill. App. 415, 420 (1951).

Affirmed in part and Reversed in part.

MORAN, P.J. and DAVIS, J. concur.

109IA2-277

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2d day of December, in the year of our Lord one thousand nine hundred and sixty-eight, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable MEL ABRAHAMSON, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit : On JUN 12 1969 the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

THE ATOM

JUN 12 1969

No. 68-128

Abstract

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

ASHOK RAILKAR,	)	
	)	
Plaintiff-Appellant,	)	
	)	
v.	)	Appeal from the Circuit Court
	)	of Kane County
JANICE A. BOLL,	)	
	)	
Defendant-Appellee.	)	

MR. JUSTICE ABRAHAMSON DELIVERED THE OPINION OF THE COURT:

This is an appeal from the Circuit Court of Kane County. Plaintiff sued for personal injuries as a result of being struck by a motor vehicle operated by defendant as he was walking along a road in the Village of Hampshire in Kane County. Plaintiff suffered severe injuries as a result of the multiple fractures to his left leg. At the conclusion of the jury trial, the defendant submitted a special interrogatory to the jury requesting a finding as to the contributory negligence of the plaintiff. The special verdict with regard to contributory negligence was that plaintiff was not guilty of contributory negligence. The general verdict was for plaintiff in the amount of $5,000. Plaintiff claims the special damages put in evidence were $5,092.68. Plaintiff filed a post trial motion asking that a new trial be granted on the issue of damages only. This motion was denied by the trial judge and plaintiff has taken an appeal from this ruling.

On June 13, 1963, defendant, Janice A. Boll, was driving her automobile southbound on State Street in the Village of Hampshire. State Street

is a two-lane asphalt road. The plaintiff was walking in a southerly direction on the gravel and grass shoulder of the road. Defendant testified that as she approached the point of the accident, her automobile was being approached by a northbound truck. The truck had dimmed its headlights and defendant had dimmed hers. At no time did defendant see plaintiff prior to striking him with her automobile. Plaintiff's injuries consisted of two fractures of the left femur and one fracture of the left fibula. Plaintiff also sustained a cerebral concussion severe enough to cause temporary mental irrationality.

Upon plaintiff's admission to Sherman Hospital in Elgin, Illinois, he was put in traction and nine days later surgery was performed. The surgery involved an open reduction of the femoral fractures, the insertion of an intramedullary rod through both fractures, the attachment of a supracondylar pin, plate and screws to the femur. Plaintiff remained in the hospital on this occasion until July 29, 1963, about six weeks from the date of the accident. For one month after surgery, he was not allowed out of bed for any reason; then, he was taken in a wheel chair to the physical therapy department. After release from the hospital, plaintiff used crutches and bore no weight on his leg until October or November and felt a great deal of pain in the leg. He remained under the care of Doctors Wohl and Travis; he used a heating pad and was given a nylon "stocking" to stabilize and warm the leg.

The plaintiff was next hospitalized in June of 1964, at which time the rod and plate were removed. He was in the hospital for two weeks, and he used crutches for three or four weeks thereafter before he could touch his leg to the ground; when he did, it was not strong enough and ached around the knee, hip and side. He was seen by Dr. Wohl until October or

November of 1965. In the fall of 1966, he was treated by Dr. Hirshtick in Chicago and was hospitalized in The American Hospital for five days, receiving massage and physical therapy. The only medical testimony presented at the trial was by Dr. Travis. Neither Dr. Wohl nor Dr. Hirshtick testified. In fact, the expenses incurred in the hospitalization in the fall of 1966 for therapy and Dr. Hirshtick's bill were not offered into evidence.

The testimony of Dr. Travis as to the permanency of plaintiff's injuries was admitedly based on what "usually happens" and he admitted on cross-examination that he had not examined plaintiff for a considerable period of time, particularly not recently, to determine whether there was any permanency of injuries, although he had treated the plaintiff for other illness, not connected with the accident.

The plaintiff contends that the verdict in favor of the plaintiff and the negative answer to the special interrogatory pertaining to the question of contributory negligence of the plaintiff are conclusive on the question of liability. Defendant contends that a motion for a new trial on damages only should be denied in that the plaintiff has the burden of showing that the verdict was not a compromise between liability and damages, citing Defreezer v. Johnson, 81 Ill. App. 2d 344 and Kinsell v. Hawthorne, 27 Ill. App. 2d 314. In view of our affirmance of the trial court there appears to be no reason to make a determination of this issue.

Plaintiff's out of pocket expense for doctors and hospital was $3,892.68. In addition, the sum of $1,200 was claimed for loss of earnings from a summer sales job with Collier, Inc., selling encyclopedias. The evidence discloses that plaintiff had completed two years of college at Bombay, India, and had come to this country to finish his education. He

attended the 1962-63 school year at the Allied Institute of Technology in Chicago. He had worked three or four days of his summer vacation to pick up some spending money. His compensation for this employment was $120 per week upon the requirement that he make two sales a week and upon failing to meet this requirement he would be on probation and apparently subsequently discharged. He returned to school and graduated in June of 1966. The only testimony concerning permanency of injuries was by the plaintiff who complained of tiredness and pain when he stood on his leg for a long time or on days of damp or very cold winter weather.

It is contended that the trial court committed error in refusing the plaintiff's post trial motion for a new trial on the question of damages only for the reason that the injuries to the plaintiff were serious and permanent and that the verdict was less than the out of pocket expenses. We have examined the cases cited by the plaintiff where the awards have been held inadequate by courts of review. In Johanneson v. Ring, 82 Ill. App. 2d 340, 346, 347, and 348, this court reviewed this issue which is summarized in Damages--15 I. L. P. 162. We are unable to say how the jury arrived at the verdict in this case since there is no claim of error in the trial. We are reluctant to interfere with the discretion of the jury where there is no error claimed. Haleem v. Onate, 71 Ill. App. 2d 457, 460.

Under the facts and circumstances of the case before us we conclude that the loss of wages is conjectural and the permanency of the injuries is speculative. In McManus v. Feist, 76 Ill. App. 2d 99, 105, the court said:

"While it appears here that the jury might very well have

awarded a larger verdict under the evidence in this case, nevertheless, this verdict was greater than the out-of-pocket expense, so that we must conclude that it comes within the orbit of those authorities which hold that fixing damages is the province of the jury. Ward v. Chicago Transit Authority, 52 Ill App 2d 172, 201 NE2nd 750."

For the reasons given, the judgment of the trial court is affirmed.

JUDGMENT AFFIRMED.

MORAN, P. J. and SEIDENFELD, J. concur.

109IA2-2812

UNITED STATES OF AMERICA

State of Illinois)
Appellate Court) ss:
Second District)

At a session of the Appellate Court, begun and held at Elgin, on the 2d day of December, in the year of our Lord one thousand nine hundred and sixty-eight, within and for the Second District of Illinois:

Present -- Honorable THOMAS J. MORAN, Presiding Justice
Honorable CHARLES H. DAVIS, Justice
Honorable GLENN K. SEIDENFELD, Justice
HOWARD K. KELLETT, Clerk
HARRY E. BOOTH, Sheriff

BE IT REMEMBERED, that afterwards, to-wit: On

JUN 16 1969

the Opinion of the Court was filed in the Clerk's office of said Court, in the words and figures following, viz:

'182 'AIEO1

No. 68-188

IN THE

APPELLATE COURT OF ILLINOIS

SECOND JUDICIAL DISTRICT

Abstract

RETHA HARROLLE,

Plaintiff-Appellant,

vs.

JAN N. HARROLLE,

Defendant-Appellee.

Appeal from the Circuit Court of the 17th Judicial Circuit, Winnebago County, Illinois.

MR. JUSTICE SEIDENFELD DELIVERED THE OPINION OF THE COURT:

This appeal is taken from an order denying plaintiff's petition to change the custody of her minor children from the paternal grandparents to herself.

The decree of divorce entered September 27, 1963 awarded joint custody of the two children (Denise, then age 2½, and Ricky, then age 5) to the parties.

A modification order was entered on November 1, 1963 awarding custody to the plaintiff.

A subsequent petition by the defendant was denied on February 14, 1964. However, on defendant's further petition the latter order was set aside on March 12, 1964, and custody of the children was awarded to the paternal grandparents.

The present petition was filed on June 10, 1968 (a similar petition was filed by plaintiff on July 5, 1967 but she did not proceed thereunder), and after a hearing the court entered the order denying the change in custody on September 17, 1968.

The petition alleged "(4) That the plaintiff now has a permanent home in which to keep said minor children, and is well able to provide for the proper care and supervision of them, and that said minor children need the love and affection that only their mother can give them"

Plaintiff urges that the issue is whether a natural mother is entitled to the custody of her minor children in priority to the paternal grandparents. But we agree with defendant that the proper question before us is whether the court abused its discretion in denying the petition, considering the circumstances subsequent to the prior order as they affected the welfare of the children.

The prior order, dated March 12, 1964, recited, in substance, that since the order of February 14, 1964 (awarding custody to plaintiff) "her circumstances have changed and that she is not presently in proper circumstances to provide the proper care and supervision for the two children", and that their best interests require custody to be changed to the husband's parents. It appears, in this record, that plaintiff agreed to the entry of the prior order.

Plaintiff testified, in this case, that at the time of the entry of the March 12, 1964 order, she had been informed that she needed surgery, would not be able to work for four months, had no money, and no place to stay. She further testified that at the time of the hearing below she lived in a home consisting of three bedrooms, a living room and kitchen which she was renting but had entered into a contract to purchase; that she was now in good physical condition and employed. She said that she lived in the home with a lady friend and plaintiff's child, born after the divorce. Plaintiff outlined a plan for a neighbor to care for the children while she was at work.

The paternal grandmother of the children testified, that the fall term of school for the children was to start the day following the hearing; to the close proximity of their home to the school; to the many children in the neighborhood; to recreational activities and to her ability to devote her full time to the children.

Defendant testified to his living next door to his parents' home and to participation with the children in daily activities.

In deciding the case, the court commented that he was not so concerned with the parties and the facilities they had to offer, but with the best interests of the children. He concluded:

> "I feel in this instance that under the present set of circumstances, I don't think I would change the custody at this time. I would suggest that an order be entered on the visitation, so that there is no question on that, and spell it out, and spell it out for this school year. And I think for this school year, the custody should remain where it is." (Emphasis added)

The guidelines have been stated often: the chancellor is given a large discretion in awarding custody of minor children, subject to review; the custody is subject to being changed from time to time as the best interests of the children demand; the decree is res adjudicata as to the facts existing at the time of entry but not as to facts arising thereafter so that new conditions must be shown to warrant a change in the prior determination of custody. Nye v. Nye, 411 Ill. 408, 416 (1952). The reviewing court will not disturb the findings of the trial court as to custody unless they are palpably against the weight of the evidence, and while a natural parent has a superior right to custody, the right is not absolute but may be required to yield to other considerations bearing on the welfare of the children.

Giacopelli v. The Crittenton Home, 16 Ill. 2d 556, 565, 566 (1959); Peo. Ex Rel. Edwards v. Livingston, 42 Ill. 2d 201, 210 (1969).

The mere fact that there has been a change in the conditions affecting the parent is not sufficient to require a change in custody, previously awarded unconditionally, unless those changed conditions affect the welfare of the children. Wade v. Wade, 345 Ill. App. 170, 179 (1951); Maupin v. Maupin, 339 Ill. App. 484, 489 (1950).

In this most difficult area of the law, we cannot say that the chancellor abused his discretion in deciding that for the present school year the best interests of the children were served by their remaining where they were.

We take note of the fact that the court has at no time made a permanent change in custody. The original decree provided joint custody between the parties. The March 12, 1964 order recited that plaintiff "is not presently in proper circumstances" to provide care and supervision. And the order appealed from likewise cannot be considered an unconditional award of custody to the grandparents in view of the statement of the court carefully limiting his findings to the temporary period of "this school year".

On this basis the court below retains jurisdiction of the case to make such further orders affecting the childrens' welfare beyond the period of the present school year as all of the circumstances, past and future, may suggest and we do not here rule upon a permanent denial of custody to a natural parent.

Affirmed.

MORAN, P.J. and DAVIS, J. concur.

No. 68-72

IN THE

APPELLATE COURT OF ILLINOIS

FIFTH DISTRICT

109IA2281

GLENNON LEIBLE and ILA MAE LEIBLE, Defendants-Appellants, RUTH RUBINSTEIN, Defendant, -vs- LESTER LOFTS, VERA LOFTS and LULA DUTY, Plaintiffs-Appellees.	Appeal from the Circuit Court for the Third Judicial Circuit, Madison County, Illinois. Honorable Michael Kinney, Trial Judge.

Per Curiam.

Glennon Leible and Ila Mae Leible appeal from an order of the Circuit Court of Madison County, granting a temporary injunction enjoining them from interfering with the plaintiffs' use of an alleged right-of-way.

On August 15, 1967, plaintiffs, Lester Lofts, Vera Lofts and Lula Duty, filed a petition and a supporting affidavit asking for a temporary injunction without notice and without bond enjoining the defendants, Glennon Leible, Ila Mae Leible and Ruth Rubinstein from preventing or in any way interfering with the passage of the plaintiffs or their business or social guests or invitees over an alleged right-of-way.

The affidavit avers that the plaintiffs are record owners of certain real estate subject to the alleged right-of-way; that the plaintiffs have used the right-of-way for more than twenty years; that the right-of-way is used as an access way to the garage of the Lofts and is the only access to the property owned by Lula Duty; that defendant, Glennon Leible has, by his own admission, torn out a culvert placed in said right-of-way by the plaintiffs; that defendant, Leible, has had Fred Duty, son of the plaintiff, Lula Duty, arrested for replacing said culvert; that defendant, Leible, continues to threaten plaintiffs and to deny them the use of said right-of-way; that defendants by such actions have and continue to violate the legal rights of the plaintiffs and to cause them irreparable and continuing harm; that no bond should be required, as the plaintiffs are asking only that defendants

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be enjoined from changing a condition that has existed for many years and that no damages will result to defendants if they are required to leave the conditions as they are.

On the same day the petition was filed, the court issued a temporary injunction without notice and without bond restraining and enjoining the defendants from interfering with the passage of the plaintiffs or the use by them or their business or social invitees over the alleged right-of-way. The court stated that it appeared from the affidavit that the rights of plaintiffs would be unduly prejudiced if the temporary injunction was not issued immediately and without notice. On September 11, 1967, defendants, Glennon Leible and Ila Mae Leible, filed a motion to dissolve the temporary injunction, alleging the following:

> "1. No pleading was, or is, on file herein by which the issuance of said injunction was authorized;
>
> 2. Said injunction was issued without bond, although no good cause was shown by the Plaintiff for the issuance of such Injunction against the defendants, GLENNON LEIBLE and ILA MAE LEIBLE;
>
> 3. Said Injunction was issued without notice to the Defendants, GLENNON LEIBLE and ILA MAE LEIBLE, or either of them, and that no pleading or Affidavit was on file herein of sufficient form or substance to support the issuance of such Injunction without notice;
>
> 4. That said Injunction was issued without notice to the Defendants, GLENNON LEIBLE and ILA MAE LEIBLE, or either of them in violation of Section 3 of Chapter 69 of Illinois Revised Statutes;
>
> 5. That the Motion and Affidavits for issuance of such Injunction contained no showing that the rights of the Plaintiffs would be unduly prejudiced if the Injunction were not issued immediately and without notice against the Defendants, GLENNON LEIBLE and ILA MAE LEIBLE;
>
> 6. That the Court was without jurisdiction to order or issue said Injunction; . . . "

Defendants Leible now contend that the petition for injunction failed to state a prima facie cause of action; that the facts shown by the affidavit or petition were not sufficient to support a temporary injunction without notice and without bond; and that the order granting the injunction did not set forth specific reasons for its issuance in violation of the statutory requirement as to form.

The most important point made by defendants is that the injunction should not have been issued without notice. Section 3 of Chapter 69 of Ill. Rev. Stat. 1967, is as follows:

> "No court or judge shall grant a preliminary injunction without previous notice of the time and place of the application having been given the adverse party unless it clearly appears, from the specific facts shown by the verified complaint or by affidavit accompanying the same, that immediate and irreparable injury, loss or damage will result to the applicant before notice can be served and a hearing had thereon."

To test the necessity for the issuance of an injunction without notice, a court must ask whether in the minutes or hours required to procure a defendant's appearance, defendant could and would do that which would seriously obstruct the court's power to deal justly and effectively with the issue in dispute. Sharpinski v. Veterans of Foreign Wars, 343 Ill App 271, 275. Circumstances countenanced by courts for issuance of an injunction without notice have been in very restricted areas, such as where the facts of the case, or the history of the parties, disclose that the giving of notice would result in accelerating the very act sought to be enjoined, or where the act to be enjoined is either taking place or would be undertaken or completed in the time required for notice. Streamwood Home Builders, Inc. v. Brolin, 25 Ill App 2d 39, 43.

In Sharpinski, supra, the court stated the situations which would justify granting an injunction without notice.

> "They embrace cases where by a stroke of the pen, a movement of the hand, or a tour de force executed overnight the defendant intends to and can destroy the substance of the litigation and thus defeat the power of the court to do justice." Id at 274.

In dealing with defendants' contention, we are concerned only with the question of whether it appears from the petition or affidavit that the allegations were sufficient to dispense with notice. Miollis v. Schneider, 77 Ill App 2d 420, 222 NE2d 715. These allegations were stated earlier. The only specific facts alleged were that defendant, Leible, had torn out a culvert and had plaintiffs' son arrested for replacing the culvert. All other allegations were in general terms, such as making threats, denying them the use of the right-of-way, and using profane language. Applying the above test to these allegations, we conclude that so far as the petition and affidavit are concerned, they are devoid of sufficient allegations to justify a court in granting an injunction without notice. These allegations do not present a situation whereby the defendants, during the time it would take to

procure their appearance, could destroy the substance of the litigation and defeat the power of the court to do justice.

Having concluded that notice should have been given, it is the duty of this court, aside from any other question and without reference to the merits of the case as made by the averments of the petition, to reverse the order denying the motion to dissolve the injunction upon that ground. Crown Bldg. Corp. v. Monroe Amusement Corp. 326 Ill App 430; Pearson v. Behrens, 350 Ill App 254.

For the reasons stated, the orders directing the issuance of the injunction and overruling the motion to dissolve the injunction are reversed.

PUBLISH ABSTRACT ONLY.

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CLERK PRO-TEMPORE APPELLATE COURT
FIFTH DISTRICT OF ILLINOIS

109 I.A. 2nd 301

#52248

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. NORMAN JEFFERSON, Defendant-Appellant.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. George N. Leighton, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

The defendant, Norman Jefferson, was indicted for aggravated incest, deviate sexual assault, indecent liberties with a child, and contributing to the sexual delinquency of a child. In a trial by the court without a jury, he was found not guilty of aggravated incest and guilty of the other offenses. Judgments were entered. After his post-trial motions had been denied, the defendant received concurrent sentences of three to five years in the Illinois State Penitentiary for each of the crimes of deviate sexual assault and indecent liberties with a child. He also received a sentence of eleven months in the Cook County Jail for contributing to the sexual delinquency of a child, which sentence was considered served due to the accused's pre-trial incarceration.

The only witnesses called by the prosecution were the child prosecutrix and her mother. The defendant and his mother testified for the defense. It is undisputed that the child's testimony was not corroborated and that the defendant always denied the accusations. At the time of trial, the accused was thirty years of age, had no prior criminal record, and was employed as a cabdriver working the evening hours.

The prosecutrix, Theresa Jefferson, age eleven at the time of the trial and the stepdaughter of the accused, testified that on Saturday, May 18, 1963, she was living with her natural mother and the accused. In the early morning of that

day, which was approximately two years before the trial, she was in her bed. Her two younger sisters were in the bedroom with her and were sleeping. She was asked by the prosecutor if she wanted to tell what her stepfather did to her. Her mother was not in the courtroom at this time but had been excluded pursuant to the motion of defense counsel to exclude all witnesses. After showing a great reluctance to testify as to this particular subject-- the child apparently shook her head "no" at one point--and after lengthy assistance from the prosecutor and the trial court, the complaining witness stated that on Saturday morning, May 18, 1963, the defendant allegedly exposed his sexual organ and unsuccessfully tried to get her to commit an act of oral copulation.

Still dressed in her pajama tops and panties, she then left the bedroom and went into the kitchen. The record is silent as to what interval of time, if any, elapsed before her stepfather allegedly entered the kitchen, moved her panties below her knees, knelt on his own knees, and allegedly attempted to commit an act of sexual intercourse. The prosecutrix stated that her stepfather did not hurt her and she returned to bed. Later that day, between 4:00 and 5:00 P.M., she spoke to her mother. Her stepfather was not at home. On the next day, a Sunday, she met some policemen in her home. She went to a police station with her mother and stepfather where she again told the police what had happened the day before. Her statement was reduced to writing. She signed both pages of her statement after reading them. She identified two papers shown to her by the prosecutor which bore her signature, and she also identified the defendant as her stepfather.

On cross-examination, the prosecutrix stated that when she met the police officers in her home on Sunday, she told

them that the criminal offenses had occurred that morning. Her stepfather was present when she made this accusation. He denied it. When a police officer indicated that the criminal acts could not have occurred on Sunday morning, as the defendant had not been home long enough, the prosecutrix, her mother, and the police officer went into another room in the house. The defendant was not present in this latter room. Upon returning to her stepfather, with her mother and the police officer accompanying her, the child accused him of committing the criminal acts on the day before, Saturday morning. The accused also denied this accusation. Continuing, the prosecutrix testified that on Saturday morning she had told her mother about the alleged crimes. She did not see the police officers until the following day.

In conclusion, the complaining witness stated that her mother was in the house when her stepfather allegedly committed these acts. The prosecutrix did not cry out for help however. Apparently, she shared a bed with her two younger sisters who were asleep on Saturday morning. She was apparently in bed with them when the defendant allegedly committed an act of deviate sexual assault upon her. Her younger sisters apparently did not awaken. The prosecutrix failed to respond to a question from defense counsel as to how many hours had passed between the time the alleged crimes occurred and she complained of them to her mother.

The defendant's wife, Ethelena Jefferson, testified for the prosecution and stated that in the afternoon of May 18, 1963, a Saturday, she had a conversation with her daughter. The next day, Sunday, Mrs. Jefferson called the police and they arrived between 6:00 and 6:30 A.M. Eventually, her daughter signed a two page written statement in the police station.

On cross-examination, Mrs. Jefferson stated that she and the defendant had been married for ten years; that there were five children; that Theresa Jefferson, the prosecutrix, was her child from a prior marriage. She and her daughter had a conversation on Saturday morning or Saturday afternoon, but she did not call the police until early Sunday morning. The police were at their home when the defendant, a cabdriver, returned from work. She admitted that originally her daughter, the prosecutrix, told the police that the alleged offenses had occurred on Sunday morning, but that after a conversation between this witness, her daughter, and a police officer in another room of the Jefferson home in which the defendant was not present, her daughter returned to again confront the defendant and this time said the alleged offenses had occurred the preceding morning. At all times the defendant denied these accusations.

Continuing, Mrs. Jefferson stated that she did not call the police on Saturday afternoon, when her daughter informed her of the incident, because these sexual acts had happened more than once in the past and she did not know whether or not she should call the police. Approximately one or two years before the date of the present alleged incident, the prosecutrix had accused her stepfather of much the same conduct, but Mrs. Jefferson had eventually withdrawn the charges. She denied that this was done because the prosecutrix later informed her that the brother of Mrs. Jefferson, the uncle of the prosecutrix, had apparently sexually abused her and not the defendant. Mrs. Jefferson did admit that her brother had lived with the defendant, herself, and their family in the past but he no longer lived with them.

On redirect examination, Mrs. Jefferson stated that

she did not call the police on Saturday as soon as her daughter informed her of the alleged criminal acts because her husband had done these things in the past and had promised to reform if his wife did not bring charges against him. When her daughter told her of these alleged sex crimes, the witness did not know whether to call the police or not. Finally, she became disgusted and called them early the next day. On recross-examination, Mrs. Jefferson admitted that when the police arrived, she told them that she was unable to telephone them earlier because she did not have the money to do so.

The defendant and his mother, Marie Jefferson, testified for the defense. The accused stated that he was arrested by police officers in his home on Sunday, May 19, 1963, between 6:30 and 7:00 A.M. after he had returned from work. Before the police arrived, he had met his wife outside their home. It was there that she told him that "she was going to get rid of me this time because she was going to have her fun before she gets too old." The defendant then went to his brother's place of business and called his mother. Upon returning home, he met the police. The prosecutrix first told the police that the alleged crimes had occurred that morning, Sunday morning, but after she and her mother and a policeman returned from another room in the house wherein the defendant was not present, the prosecutrix altered her accusation and said the offenses occurred on Saturday morning. The defendant denied the crimes alleged in the indictment. In conclusion, he stated that in the police station the police officers did not question him about the alleged offenses. No police officers testified in the case at bar.

On cross-examination, the defendant stated that he had called his mother in the past when he and his wife encountered

marital difficulties and had lived with his mother until the problem was resolved. The accused testified that he and his wife had many arguments in the past, but he never struck her. He twice repeated his earlier testimony, originally made on direct examination, that his wife told him she called the police so "she could get rid of him for good this time and have her fun before she got too old." Furthermore, the accused stated that he and his wife had a verbal argument on Saturday evening before he left for work. The reason for this argument was that his wife wanted to go to a party with her cousins and he wanted her to stay at home. In conclusion, the defendant testified that the prosecutrix gave a written statement to the police in the police station on Sunday morning, and he heard his wife read it to her.

The defendant's mother, Marie Jefferson, testified that she knew her son's wife and had a conversation with her regarding a morals charge brought against the defendant one or two years prior to the instant indictment. In that conversation the defendant's wife told this witness that the wife's brother had sexually abused the prosecutrix on the earlier occasion and not the defendant. On cross-examination, this witness stated that her son did telephone her in the early morning hours of May 19, 1963, and told her to come over but did not give a reason. In the past the defendant had left his wife because he did not like the way she was living.

On redirect examination, the defendant's mother stated that her son would leave his wife at various intervals because she was having extra-marital affairs and this led to arguments. On recross, the witness testified that she never saw her daughter-in-law have an affair, but the wife always told her husband, the defendant, about them.

In rebuttal, the prosecutrix stated that she read her statement aloud in the police station on Sunday. Only her mother was present when she read it. The prosecutrix was the only witness called by the State in rebuttal. The prosecution did not offer her written statement into evidence.

In this appeal, the defendant contends that he was not proved guilty beyond a reasonable doubt in that he denied the charges and the complaining witness' story was neither clear and convincing nor corroborated. Alternatively, he urges that only one judgment and sentence should have been imposed as the alleged criminal offenses involved but one act of criminal conduct.

At the trial of this cause, the State sought corroboration of the testimony of the young prosecutrix by asking her mother what her daughter said to her on Saturday, May 18, 1963. The court properly sustained the objection of defense counsel because in indecent liberties cases, unlike rape cases, it is improper to allow into evidence the fact that the prosecutrix made a complaint. The reason for receiving such evidence is not present in cases of assault other than rape. See People v. Romano, 306 Ill. 502, 138 N.E. 169 (1923); People v. Gambony, 402 Ill. 74, 80, 83 N.E. 2d 321 (1948); and People v. Smith, 55 Ill. App. 2d 480, 487, 204 N.E. 2d 577 (1965). The res gestae exception to the hearsay rule is also not involved in this case as the prosecutrix complained to her mother hours after the alleged crimes had occurred. The prosecution then sought corroboration of the prosecutrix's accusation by showing that in the past the defendant had been accused of a similar morals violation against the prosecutrix. This is proper corroboration as it shows the relationship of the parties and is evidence of the intent with which the instant act complained of was done. See

People v. Richardson, 17 Ill. 2d 253, 161 N.E. 2d 268 (1959); People v. Pazell, 399 Ill. 462, 467, 78 N.E. 2d 212 (1948). However, the persuasiveness of this attempted corroboration was negated by the testimony of the mother of the defendant who stated that his wife had told her that the uncle of the prosecutrix had sexually abused the child on the prior occasion and not the defendant. Furthermore, the wife of the defendant had withdrawn the charge and had earlier testified that her brother (prosecutrix's uncle) no longer lived with the family. She was not called in rebuttal to meet the new matter interjected into the case by the testimony of the defendant's mother, which explained the prior morals charge. Thus, it was proper for the trial court to expressly find on more than one occasion before rendering judgment that the young prosecutrix's testimony was not corroborated and was denied by the accused.

In this posture of the case, the rule of law to be applied is simple in its enunciation but difficult in its application. It was recently succinctly stated by the court in People v. Kolden, 25 Ill. 2d 327, 329, 185 N.E. 2d 170, 171 (1962):

> "It is well settled in Illinois that where a conviction for taking indecent liberties with a child depends on the testimony of the prosecuting witness, and the defendant denies the charge, there must be substantial corroboration of her testimony, or the testimony must be otherwise clear and convincing. . . ."

The court also stated in People v. Watkins, 405 Ill. 454, 457, 91 N.E. 2d 406, 407 (1950):

> ". . . An indecent liberties case is similar in character to that of rape, because it is an accusation easily made, hard to be proved, and harder to be defended by the party accused, though ever so innocent. (Citation omitted.) We have always safeguarded the interests of an accused where the testimony is uncorroborated, by requiring that it should be clear and convincing. . . ."

In this case the defendant denied that he ever took

indecent liberties with the prosecutrix. His conviction rests upon the testimony of the prosecutrix, a child of eleven at the time of the trial. It is undisputed that her testimony is uncorroborated. We have determined that it is also not clear and convincing. The record reveals, and it is undisputed, that at the scene of the arrest the prosecutrix originally accused the defendant of committing the crimes in the morning of that day, which was highly improbable, as the accused had just arrived home from work. It was only after she had been taken into another room by her mother, who was accompanied by a police officer, that the child returned to confront the accused and altered her accusation to say the sexual acts occurred on the morning of the prior day. The defendant was not present in the other room. The evidence thereby supports an inference that the mother coached her young daughter in the other room, which resulted in an alteration of the prosecutrix's accusation. No police officer testified in this case to rebut such an inference.

Furthermore, the prosecutrix became a reluctant witness when she was asked by the prosecutor if she wanted to tell what her stepfather did to her on Saturday, May 18, 1963. The record indicates that she negatively shook her head at one point when faced with this question. It was only after lengthy assistance from the prosecutor and the court that the child continued her testimony. Up to that point she had been a willing witness who gave straightforward answers. Perhaps her reluctance to testify regarding this particular matter was due to the fact that the crimes had been allegedly committed by her stepfather and she was ashamed of this as well as what had allegedly happened to her. Perhaps her reticence was due to the fact that her mother had been excluded from the courtroom as had all other prospective witnesses and in her absence, the child now experienced bonafide

doubts as to the truthfulness of her accusation. The latter portion of this opinion will address itself to the credibility of the defendant's wife as a witness.

After much initial reluctance, the prosecutrix did testify as to the sexual crimes which were allegedly committed by the defendant on Saturday morning, May 18, 1963, including an attempted act of sexual intercourse. She stated that her mother was home at the time and yet she did not cry out for help. Furthermore, she testified that her father did not hurt her and she returned to bed after the incidents. These actions, coupled with the fact that the prosecutrix altered her accusation at the scene of the arrest after being coached by her mother in a room in which the defendant was not present, are sufficient to convince us that her testimony was not clear and convincing so as to result in the defendant's incarceration when he has denied the accusations.

Moreover, within the facts of this case, we are of the opinion that justice will not be served by merely looking at the testimony of the prosecutrix. In People v. Pazell, 399 Ill. 462, 468, 78 N.E. 2d 212 (1948), which also involved the crime of indecent liberties with a child in which there was no corroboration, the reviewing court looked at the evidence presented by both sides and concluded that a reversal and remandment was in order. When we examine the testimony of the defendant's wife on the one hand and that of the defendant on the other, we note inconsistencies which create a reasonable doubt in our minds as to whether the alleged crimes occurred. For example, the defendant's wife testified that she did not call the police until the following morning because her husband had promised to reform when a similar incident with the prosecutrix had allegedly occurred one or more years earlier. However, on

recross-examination, she admitted that when the police arrived on Sunday morning she told them that she had not called earlier because she did not have the money. These are hardly the actions of a mother whose young daughter has allegedly been sexually abused.

The defendant suggested a reason for his wife's telephone call to the police on Sunday morning when he testified that he and his wife had a quarrel on Saturday evening and on Sunday morning she said to him, before the police arrived, that "she was going to get rid of me this time because she was going to have her fun before she gets too old." In rebuttal, the State did not recall the wife of the defendant to answer this new matter, which showed a bias or interest on her part to gain a criminal conviction against her husband. She could have possibly used her daughter as a vindictive instrument. All of these factors are sufficient to convince us that, within the facts of this case, a reasonable doubt exists as to whether the crimes actually occurred.

The cases cited by the State in support of its contention that the testimony of the prosecutrix was clear and convincing are distinguishable on their facts from the case at bar. In all of the cited cases, the evidence supporting the convictions was far more compelling and conclusive than the evidence in the instant case. People v. Newsum, 98 Ill. App. 2d 219, 240 N.E. 2d 780 (1968) involved a conviction for indecent liberties in which it was expressly found by the reviewing court that part of the young victim's testimony was corroborated by a police officer in that both described the apartment in which the crime occurred. Also, the reviewing court expressly found that the young male victim's testimony was clear and convincing. In the instant case, it is undisputed that the prosecutrix's

testimony was not corroborated. People v. White, 63 Ill. App. 2d 105, 211 N.E. 2d 9 (1965) involved a prosecution for rape and a crime against nature in which a mature woman was sexually abused and identified the defendant in a hospital bed as her assailant shortly after the crimes had occurred. The accused pretended to be asleep in the bed and did not answer any questions. The reviewing court affirmed the judgment and did not accept the defendant's reasonable doubt argument. The evidence in the cited case supporting the conviction is more conclusive than the evidence in the instant case however.

People v. Smith and Dean, 95 Ill. App. 2d 235, 238 N.E. 2d 186 (1968) involved a prosecution for rape and aggravated kidnapping in which the reviewing court did not accept the defendants' reasonable doubt argument since the testimony of the prosecutrixes was corroborated by eyewitnesses as to the aggravated kidnapping charge and by the victims' immediate accusations and subsequent medical examinations as to the rape indictment. In the case at bar, it is undisputed that the prosecutrix's testimony was not corroborated. In People v. Flowers, 98 Ill. App. 2d 289, 240 N.E. 2d 761 (1968), the reviewing court rejected the defendant's reasonable doubt argument in a prosecution for rape and indecent liberties and chose not to interfere with the trial court's judgment that the defendant did not reasonably believe that the prosecutrix was sixteen years of age or older when he compelled her to engage in sexual relations. This affirmative defense to an indecent liberties charge [Ill. Rev. Stat. (1967), ch. 38, §11-4 (b) (1)] is not involved in the instant case. Thus, the cited cases are not persuasive.

A vital distinction has always been preserved in the law between the rule which states that the credibility of the

witnesses is for the trial court and the rule which states that a reviewing court must reverse a conviction when the evidence is improbable, unsatisfactory or insufficient thereby resulting in a reasonable doubt as to the defendant's guilt. As stated by the reviewing court in People v. Williams, 414 Ill. 414, 418, 111 N.E. 2d 343, 345 (1953), wherein it reversed an indecent liberties conviction:

> "We are familiar, of course, with the rule that when a cause is tried before the court without a jury, this court should not substitute its judgment for that of the trial court when evidence is merely conflicting. (Citation omitted.) However, upon review of this record, we find that the evidence upon which this conviction is based is completely unsatisfactory. We are of the opinion, therefore, that the conviction of this defendant must be reversed. . . ."

After carefully reviewing the evidence in this record, we are of the opinion that a reasonable doubt exists as to whether the alleged crimes actually occurred. Therefore, the judgments are reversed. It is unnecessary for us to discuss the second contention raised by the defendant.

JUDGMENTS REVERSED.

BURKE, J., and MC CORMICK, J., concur.

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PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. CHARLES LOGGINS, Defendant-Appellant.	) APPEAL FROM) CIRCUIT COURT,) COOK COUNTY.) HON. JAMES J. MEJDA, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty by a jury of the crime of robbery and was sentenced to a term of nine years to sixteen years in the penitentiary. On this appeal he maintains that he was not proven guilty beyond all reasonable doubt; that his identification by the two prosecuting witnesses was inadmissible because it was induced by improper police action, that consequently his alibi evidence cannot be disregarded; and that the sentence imposed was excessive.

Mrs. Mary Ellen Ricks testified that she had been employed for several years as an assistant personnel director of the Pekin Cleaners, a cleaning business with several store locations throughout the Chicago area, and that the nature of her employment required her to visit various Pekin stores to check on personnel, customer and store problems.

Mrs. Ricks testified that at approximately 6:00 P.M. on December 2, 1966 she was in the Pekin store located at Douglas Boulevard and Kedzie Avenue in Chicago with the regular store clerk, Miss Cleo Binns, when defendant entered the store and announced a hold-up. Defendant had his left hand in his pocket. He told the two women not to get nervous or excited, and warned that they should not try to signal or warn of the hold-up or he would kill them. Miss Binns was ordered by defendant to continue what she had been doing prior to defendant's entry and Mrs. Ricks was ordered to give defendant money. Mrs. Ricks went to the store cash register from which she

removed approximately $20.00 in currency and change. She handed defendant $16.00 in currency which he took in his right hand, continuing to hold his left hand in his pocket. Mrs. Ricks asked defendant if she could not keep the change in the register in order to continue business that day, and defendant agreed.

Mrs. Ricks further testified that defendant was in the store from three to four minutes while the hold-up was in progress and was standing five to six feet from her during that time. She stated the lighting in the store consisted of three fluorescent lights, two of which ran the length of the store and the third in the center of the front of the store. Mrs. Ricks testified that she could see defendant's face, and described him as five feet and seven or eight inches tall, 150 to 160 pounds in weight, extremely neat in appearance, having a right eye which seemed to wander and which he could not seem to focus, and standing in a somewhat stooped position. Prior to leaving the store, Mrs. Ricks testified, defendant stated to the women that they should remember that he did not attempt to harm them nor did he attempt to take any of their personal possessions. At no time did defendant display a weapon.

After defendant left the store, Mrs. Ricks telephoned the police and her company office. Approximately five minutes after the robbery, Detective William Thompson entered the store and showed Mrs. Ricks a sheet of three or four photographs, one of which she identified as a photograph of the defendant, the person who had just held up the store. Officer Thompson was joined shortly by Officer Singleton to whom Mrs. Ricks gave the above description of the defendant. Mrs. Ricks further testified that she was summoned to police headquarters at 11th and State Streets in Chicago on December 10, 1966 where she identified defendant as the robber, out of a line-up of six men.

Miss Cleo Binns' account of the robbery substantially conformed to that given by Mrs. Ricks, including the identification of the defendant by means of the photograph shown to her at the store by

Officer Thompson immediately after the robbery and the identification at the line-up on December 10th at police headquarters. In addition Miss Binns testified that approximately 2:00 P.M. on the date of the robbery, defendant entered the store, represented himself as "Mr. Harris" and told Miss Binns that he had theretofore left some clothes at the store to be cleaned but that he had lost his receipt ticket. Miss Binns declined to give him the clothes he requested, stating that he would have to return on another day.

Detective Thompson testified that he entered the Pekin store in question approximately 6:00 P.M. on December 2, 1966 and was informed by Mrs. Ricks and Miss Binns that the store had just been robbed. The officer stated that he then showed the two women a photograph which they identified as being that of the defendant, the person who had just robbed the store.

Defendant called Allen Townsend, defendant's uncle, as a witness who testified that defendant was at the Townsend home on December 2, 1966 from 11:00 A.M. until shortly after 6:00 P.M. that evening. Defendant's nephew and his aunt also testified that defendant was in the Townsend home from 11:00 A.M. until 7:30 or 8:00 P.M. on that date.

Officer Earl McLean testified that he made a police report of the robbery and recorded the description of the robber given by Mrs. Ricks and Miss Binns. The report showed defendant's description to be 150 to 175 pounds in weight, five feet and eight to ten inches in height, and thirty to thirty-five years of age. (It was stipulated that defendant's age was twenty-nine.) The officer testified that his report contained no reference to the defendant's having a wandering eye, poor posture or a mustache, the latter of which was also testified to by the prosecuting witnesses at trial.

Defendant testified in his own behalf and stated that he was in the Townsend home from 10:30 A.M. until 9:00 P.M. on the date in question. He denied committing the robbery.

The state thereafter introduced evidence of defendant's prior

conviction for armed robbery in 1962, to which defendant had pleaded guilty and for which he was sentenced to a term of five to fifteen years in the penitentiary. After the jury returned its verdict of guilty and at the hearing in aggravation and mitigation, the state showed that, in addition to the above 1962 armed robbery conviction, defendant had been paroled on July 13, 1966 for an offense committed that same year. The defense in turn showed that the Pekin Cleaners robbery conviction was a violation of defendant's 1966 parole, that he had an unconfirmed history of epilepsy, and that he had been married, was separated from his wife and had five children.

Defendant first maintains that he was not proven guilty beyond a reasonable doubt for the reason that the testimony of the state's two prosecuting witnesses is subject to grave doubt and is difficult to reconcile with the entire record.

The state's evidence establishes that Mrs. Ricks and Miss Binns, the two Pekin Cleaners employees, were confronted by a man who, from five to six feet away, demanded money from the women and threatened them with physical harm. The man was unmasked, the store was well lighted, and the occurrence lasted three to four minutes. Almost immediately after the man left the store after the hold-up, police officers entered the store and Mrs. Ricks and Miss Binns gave them a description of the robber and identified defendant as the robber from a photograph shown to them by the officers at that time. At the trial both women were asked whether the photograph shown to them at the store led to their identification of the defendant as the robber. Mrs. Ricks replied, "No, the image of the man standing in front of me who just threatened my life, that is what was etched in my mind." Miss Binns replied to a similar question, "No, I would have known him anyway." A positive identification by a single witness who had ample time and opportunity to observe the accused will support a conviction even though the testimony is contradicted by the accused. People v.

Spencer, 81 Ill. App. 2d 344. Here there were two, not one, positive identifications of the defendant as the robber.

Defendant points to several alleged conflicts and discrepancies in the testimony of the state's witnesses and that of Officer McLean who was called to testify by the defendant. The description given of defendant by Mrs. Ricks at trial, which she stated she gave to the police immediately after the robbery, did not conform to the description of defendant which Officer McLean testified Mrs. Ricks and Miss Binns gave to him at the store after the robbery. However, Mrs. Ricks testified that the description of the defendant which she related to the police was given to Officer Singleton, one of the first two officers at the scene after the robbery. Matters of conflict in the testimony, such as are alluded to by the defendant, are for determination by the trier of fact, and such determination will not be disturbed where, as here, there is ample evidence, if believed, to support the judgment. People v. Jackson, 28 Ill. 2d 37; People v. Jennings, 84 Ill. App. 2d 33.

Defendant next contends that the prosecuting witnesses' identification of him at the police line-up was based upon the photograph and upon the verbal suggestions of the police that defendant was the suspect, and that therefore such evidence is inadmissible as evidence. We disagree.

Defendant states that the police suggested to Mrs. Ricks and Miss Binns that the police had "the suspect available in a line-up for them to identify." However, Mrs. Ricks testified that she was notified through a message from her office switchboard that the police had arrested a man who might possibly be the one who committed the robbery and that they wanted her to attend a line-up. She further testified that she had no conversation with the police prior to the line-up, other than a "general statement [by the police] as to what was taking place and what we all should do, but there was no personal conversation." Nor does anything in the record show that

the police in any way approached Miss Binns with respect to the line-up other than to request her to attend the line-up on December 10th. After a suspect's arrest, it is proper police procedure for the police to notify the victim of a crime to appear at police headquarters for identification purposes. People v. Newsum, 98 Ill. App. 2d 219. United States v. Wade, 388 U.S. 218, has no application to the circumstances in the case at bar, inasmuch as the trial of this cause was concluded prior to June 12, 1967. See Stovall v. Denno, 388 U.S. 293.

Defendant's third point, that the alibi of the defendant should be believed and not be disregarded, is based upon his position that the testimony of the state's prosecuting witnesses was unbelievable. All cases cited by defendant in support of this position hold that where a reasonable doubt exists as to defendant's guilt because of uncertain identification, as viewed from the entire record, the evidence presented by defendant cannot be disregarded. See e.g., People v. Peck, 358 Ill. 642; People v. Gooden, 403 Ill. 455; People v. McGee, 21 Ill. 2d 440. As shown above, the testimony of Mrs. Ricks and Miss Binns is sufficient, if believed, to prove defendant guilty beyond all reasonable doubt.

The final point raised by defendant is that the sentence imposed, of nine years to sixteen years in the penitentiary, is excessive. Defendant admittedly had a past record and was in fact on parole when he committed this robbery. He threatened the two Pekin employees with death if they attempted to warn anyone of the robbery, all the while holding his left hand in his pocket. It is quite apparent that Mrs. Ricks feared for her life, which was the reason she advanced that defendant's image was "etched" in her mind. It is the primary duty of the trial court to determine the length of the sentence to be imposed after a defendant is found guilty, after having heard all factors in aggravation and mitigation. Ill. Rev. Stat. 1967, Chap. 38, Para. 1-7(g). The trial court expressly stated prior to sentencing defendant

that he was concerned with the question of the rehabilitation of the defendant. On the basis of defendant's past record and the circumstances of the case at bar, we feel the sentence imposed was not excessive.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

109 I.A. 2nd 302

53085

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee,	)	APPEAL FROM
vs.	)	CIRCUIT COURT,
JOSEPH J. NEARY, Defendant-Appellant.	)	COOK COUNTY.
	)	HON. JACQUES F. HEILINGOETTER, Presiding.

MR. JUSTICE BURKE DELIVERED THE OPINION OF THE COURT:

Defendant was found guilty at a bench trial of the crime of theft by deception and was sentenced to a term of one year to four years in the penitentiary. He appeals.

Mr. Salvatore Seno testified that he was the vice-president of Seno and Sons, Incorporated, a formal wear and fur rental business with eleven stores operating in the Chicago area. He testified that his brother, Louis Seno, was president of the company, and that on December 20, 1966, Mr. Nicholas Braccolino was the manager of Seno's Roseland store located at 11516 South Michigan Avenue in Chicago.

Mr. Braccolino testified that on December 19, 1966 he received a telephone order for the rental of a mink stole from "Mr. Belson" and recorded the pertinent information on one of the rental order blanks provided by the Seno corporation for that purpose. Approximately 1:00 P.M. on December 21, 1966 defendant entered the store to pick up the Belson order. When asked by Mr. Braccolino whether he was Belson, defendant replied, "No, I'm not. Mr. Belson is working. I'm Mr. Cook. I'm picking up the fur for Mr. Belson." Defendant then produced an Indiana driver's license and a social security card as identification, both of which bore the name "Harry Cook."

The driver's license number, the Hammond, Indiana address appearing on the license, and the social security number were written by Braccolino on the reverse side of the carbon copy of the order blank on which the Belson order had been previously recorded. This carbon copy was introduced as People's Exhibit 1. Braccolino also wrote the words "received by Harry Cook" on the reverse side of

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Exhibit 1, and asked defendant to sign it; defendant signed the name "Harry Cook." Braccolino informed defendant that the rental expired the following day, December 22nd. Defendant paid the stated rental, took the fur and left the store.

Mr. Braccolino testified that as a further precaution, he followed defendant out the door and noted the make and model of defendant's automobile, as well as the license number of the vehicle which he also recorded on the reverse side of Exhibit 1. When the fur was not returned the following day, Braccolino went to the Hammond Street address recorded on Exhibit 1 only to find the location to be in the center of an intersection. Mr. Braccolino thereupon notified the Chicago police.

Defendant was identified by Braccolino at the Dolton, Illinois police station on December 23, 1966, at which time defendant requested Braccolino not to sign the complaint against him, stating that if he did not, defendant would produce the fur upon leaving the station. Braccolino further testified that he had been in the employ of the Seno corporation approximately three and one-half years, and that the value of the fur taken by defendant to be $400. People's Exhibit 2 was introduced into evidence which was the original order blank on which the Belson order had been recorded by Braccolino.

Chicago Police Officer William Zeilengo testified that he, his Chicago Police Officer partner, the Dolton, Illinois Chief of Police and a Dolton police officer went to defendant's Dolton home after Zeilengo had a conversation with Mr. Braccolino on December 22, 1966. The officer testified that he parked his police vehicle a few doors from defendant's home and was looking for defendant's vehicle as described to the officer by Braccolino. As defendant's vehicle approached the squad car, the headlights of defendant's automobile were switched off and the automobile sped away with the squad car in pursuit. After a four block chase, defendant's vehicle stopped

and defendant and his wife alighted from the vehicle. A fight ensued between defendant and the police; after he was subdued, defendant was taken to the Dolton police station.

Louis Seno testified that he was the president of Seno and Sons, Incorporated, and was in charge of purchasing, among his other duties. He testified that he purchased the fur in question on September 2, 1966 for the sum of $390. He was also asked his opinion of the retail value of the fur piece which he set at $780. An invoice from Alper Furs for a mink stole listed at $390 was introduced into evidence as People's Exhibit 3. The handwritten legend "116-CSS 2500-A" appearing on the invoice was explained by Louis Seno as the identification mark given to that particular fur after its purchase; he stated that such an identification mark is given to all furs purchased by Seno. A group of exhibits purporting to be a series of invoices covering furs other than the one in question, as well as a receipt covering the cost of those furs and the fur in question, were marked for identification but were never submitted or admitted into evidence although they appear in the record. Mr. Seno also testified that Mr. Braccolino left the Seno employ approximately two months prior to the trial of this cause.

The testimony of defendant's wife, Mrs. Susan Neary, contradicted that of Officer Zeilengo with respect to the events leading up to the defendant's arrest on the early morning of December 23rd. Mrs. Neary also testified that when she returned home after her husband's arrest she found all her Christmas packages had been torn apart. She further stated that she met Mr. Belson sometime in the spring of 1967.

Defendant Joseph Neary testified that he was employed as a printer by the Chicago Tribune and that in December 1966 he held a part-time job as a bartender. He stated he met Mr. Belson at the bar where he was working and became acquainted with him over a

period of time. On December 20th Belson requested defendant to do him a favor by picking up a package at the Roseland Seno store. Defendant testified that he went to the store on the afternoon of December 21st, paid the required rental fee, and produced identification of his identity consisting of a traffic ticket, a social security card and a Tribune employment card, all bearing the name "Joseph J. Neary." Defendant stated that at no time was he aware of the contents of the package. Defendant stated he left the package at the bar where he worked where Belson was supposed to pick it up. Defendant denied the theft of the stole.

On cross-examination defendant stated that he saw Belson several times after his arrest, but that he at no time attempted to notify the police of Belson's whereabouts because defendant thought that Belson had returned the fur to Seno. Defendant denied having ever been to the Seno stores located at 185 North State Street and at 3218 West Lawrence Avenue, both in Chicago, and further stated that he did not recognize either Mr. Melvin Apfelberg or Mr. Irving Rosenberg, both of whom were present in the courtroom and who were associated with those stores.

In rebuttal, the state called Mr. Apfelberg and Mr. Rosenberg, both of whom testified that on the afternoon of December 21, 1966 defendant rented furs from them using an Indiana driver's license bearing the name "Harry Cook" as identification.

Defendant first maintains that he was not proven guilty beyond all reasonable doubt, in that the state failed to show the Seno corporation's ownership of the fur in question, proof of its value, deception and knowledge on the defendant's part, and intention on his part to permanently deprive the Seno corporation of the fur.

Salvatore Seno, the vice-president of Seno and Sons, Incorporated, testified directly to the corporate status of the business. People v. McGuire, 35 Ill. 2d 219, 230-232. Louis Seno testified that he did the purchasing for the Seno corporation and that he

purchased the fur in question on September 2, 1966 for the sum of $390. He further testified that he had been purchasing furs since 1961 and that in his opinion the retail value of the fur was $780.

Store manager Nicholas Braccolino testified that he received a telephone order for the rental of a fur on December 19, 1966 from a person who identified himself as "Mr. Belson." On December 21st, two days later, defendant, acting under the name of "Harry Cook" and by means of a false driver's license and social security card, succeeded in obtaining the fur in question from Braccolino under the pretext that he was acting on behalf of Belson. The guilty knowledge and intention of defendant, to permanently deprive the Seno corporation of the fur, may clearly be inferred from the circumstances surrounding his actions. Furthermore, Braccolino testified that defendant offered to return the fur if Braccolino did not sign the complaint against him. Under the evidence submitted by the state defendant was proved guilty beyond all reasonable doubt.

Defendant next contends that the trial court improperly allowed into evidence People's Exhibits 1, 2, and 3. His attack on Exhibits 1 and 2, namely, the original Belson order form and its carbon copy, is directed primarily toward the credibility of Braccolino; he also points to the existence of a notation appearing on the face of Exhibit 1 which does not appear on the face of Exhibit 2 and argues that this is an alteration on Exhibit 1 which will not permit of its admissibility as evidence.

Defendant argues that an impression was left by the testimony of Braccolino and Salvatore Seno that Braccolino was in the employ of the Seno corporation at the time of the trial, whereas in fact he was no longer in its employ, according to the testimony of Louis Seno that Braccolino terminated his employment with Seno approximately two months prior to the trial. Whether such impression was in fact created and what effect, if any, it had upon the credibility of the

witnesses was a question for the trier of fact to determine. Braccolino also testified that he filled in the "Date Returned" space on the face of the Belson order blank with the words "December 22nd"; however, he explained that "December 22nd" was not the date the fur was actually returned, but that it was the date the fur was to be returned to the borrower. A third point raised by defendant in his attack on the credibility of Braccolino is that Braccolino testified that all the writing on the reverse side of Exhibit 1 was placed there by him, whereas he also testified that defendant signed the name "Harry Cook" on that side of the exhibit. This was also a matter of credibility to be determined by the trier of fact from the context in which those answers were given.

The notations appearing on the face of Exhibit 1, not appearing on the face on Exhibit 2, correspond to the identification number given the fur in question after its purchase by the Seno corporation (which is also found on Exhibit 3) and to the value of the fur as testified to by Braccolino. In all other respects the matters contained on the faces of these two exhibits are identical. These additional notations appearing on Exhibit 1, not appearing on Exhibit 2, are not such as to render the exhibits inadmissible as evidence under the Business Records Act. See Ill. Rev. Stat. 1967, Chap. 38, Para. 115-5; see also United States v. Boespflug Const. Co., 325 F. 2d 54, 62.

With respect to Exhibit 3, defendant suggests that Louis Seno was not the proper party to lay the foundation for its admission into evidence. Seno testified that he purchased furs for the Seno corporation and that he purchased the fur in question from Alper Furs on September 2, 1966. He identified Exhibit 3 as the invoice attending that sale, and also stated that the identification number given the fur in question was written on the exhibit by either himself or his secretary after the purchase. It should be noted that all

three exhibits objected to by defendants were corroborative of the matters testified to by Louis Seno and by Braccolino and as such were cumulative evidence.

Defendant next contends that the value of the fur in question, at the time of the alleged theft, was not proved. In his direct examination Braccolino testified that the fur cost $400. Although he conceded that he was not an expert in the valuation of fur pieces, Braccolino stated that he did manage the Seno Roseland store for three and one-half years; his testimony is entitled to some weight and was a matter for determination by the trier of fact. Louis Seno testified that he had been in the business of purchasing furs since 1961 and that he purchased the fur in question from Alper Furs for $390. When asked, "Do you have an opinion, sir, of the retail value of this particular fur piece?" Louis Seno replied,"$780.00," thereby placing the value of the fur at the time of the theft at over $150. (See e.g., People v. Tassone, 41 Ill. 2d 7, 12.)

The final point raised by defendant is that the trial court should not have permitted the testimony of the state's two rebuttal witnesses into evidence, for the reason that they had been present during the trial of the cause although a pre-trial motion to exclude witnesses had been allowed.

In People v. Crump, 5 Ill. 2d 251, 264-266, our Supreme Court observed that, although the trial court is vested with the discretion to allow a witness to testify where that witness was present in the courtroom during the trial and after a motion to exclude witnesses had been allowed, it was error to have permitted the witness there in question to testify under the circumstances, but it was not such error as to have prejudiced the defendant; the Court further acknowledged the holding in the case of People v. Botulinski, 383 Ill. 608, also cited by defendant in support of this position. Defendant here has demonstrated no prejudice worked to him by the trial court's allowance of the testimony of the rebuttal witnesses into evidence. This was a

bench trial; the trial court is presumed to possess the ability to properly weigh the testimony of a witness who has been present in the courtroom during the trial of the cause. See People v. Nelson, 33 Ill. 2d 48, 53.

For these reasons the judgment is affirmed.

JUDGMENT AFFIRMED.

LYONS, P.J., and McCORMICK, J., concur.

109 I.A. 2nd 337

52392)
52393) Consolidated

PEOPLE OF THE STATE OF ILLINOIS, Plaintiff-Appellee, vs. RONALD EDMONDS and LARRY J. EDMONDS, Defendants-Appellants.	)	APPEAL FROM THE CIRCUIT COURT OF COOK COUNTY. Hon. James J. Mejda, Presiding.

MR. PRESIDING JUSTICE LYONS DELIVERED THE OPINION OF THE COURT.

Ronald Edmonds and Larry J. Edmonds, brothers, were convicted, following a jury trial, of the offense of burglary. Larry Edmonds was sentenced to a term in the Illinois State Penitentiary of not less than three, nor more than eight years. Ronald Edmonds was sentenced to a term in the Illinois State Penitentiary of two to five years. Each of the defendants appeal alleging error by the trial court in its denial of their motion to suppress certain evidence and that the indictment under which they were tried was fatally defective.

At approximately 5:30 A.M. on the morning of October 25, 1965, petitioners were observed by police officers Hector Crosier and Bernard Kelly as they walked southbound on Calumet Avenue at Forty-seventh Street, Chicago, each of them carrying armloads of bundles. As the officers approached to investigate, they discovered that Larry Edmonds had a number of transparent garment bags containing an assortment of mens' and womens' clothing and that Ronald was carrying approximately eight neatly wrapped bundles bearing invoices which recited their contents to be mens' shirts. The garment bags and invoices bore the name "Leader Cleaners."

Petitioners told the officers that they found the articles and when asked where their discovery took place they responded simultaneously, one saying Forty-fourth Street and

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the other Forty-sixth Street. The officers placed petitioners in their patrol car, stating to them that they would go to a Leader Cleaners establishment at 4200 South Park, some six blocks away, that if all was in order there, petitioners would be free to go. At the Leader Cleaners establishment were found other police officers who were then in the process of investigating an apparent burglary of the premises. Petitioners were then taken to the police station.

At the trial, Miss Carrie Williams, manager of the burglarized premises, testified that she had locked the premises upon leaving on the evening of October 24, 1965. She further testified that the burglar alarm was set off approximately 5:25 to 5:30 A.M. on the morning of October 25; that the articles of clothing which the officers took from petitioners and turned over to her were articles that had been taken from the premises. Defendants did not testify at the trial.

Defendants contend that the trial court erred in denying their motion for suppression of evidence concerning the clothing taken from their possession by the police officers. They allege that when the officers stopped them they were not violating any statute or ordinance, the officers did not know that an offense had been committed, nor have reasonable grounds to believe that they had committed an offense. Defendants conclude that since the articles were taken without a warrant and there was no probable cause for their arrest, the search and subsequent seizure of the clothing violated constitutional principles and for that reason the evidence should not have been admitted in evidence against them at trial.

With respect to the allegation of an unreasonable and therefore unconstitutional search, we agree with the trial court that no search took place. The facts of the present

case bring it squarely within what has come to be known as the "plain view" doctrine.

> We have held that a search implies a prying into hidden places for that which is not open to view; and that a search implies an invasion and quest with some sort of force, either actual or constructive . . . . Where, as here, the articles are in plain and open view and are observed by police officers under suspicious circumstances, it is not a 'search' nor an unreasonable seizure for the officers to make a reasonable investigation hereof [sic]. People v. McCracken, 30 Ill. 2d 425, 197 N.E. 2d 35 (1964) at 429.

In the present case there was no prying into hidden places for articles hidden from open view. There was no search.

The question of the reasonableness of the seizure of the articles must be determined by the validity of the arrest, since such was not conducted pursuant to a warrant. People v. Roebuck, 25 Ill. 2d 108, 183 N.E. 2d 166 (1962); People v. Jones, 31 Ill. 2d 42, 198 N.E. 2d 821 (1964), Cert. Denied 379 U.S. 864. We hold that at the time petitioners were placed in the patrol car reasonable cause for an arrest existed. As stated by the Supreme Court in People v. Jones, supra, at 46-47:

> . . . reasonable grounds or probable cause for arrest exists if the facts and circumstances known to the officer would warrant a prudent and cautious man in believing that the person arrested was guilty of an offense. . . existence of reasonable cause which will justify an arrest without a warrant depends upon 'the factual and practical considerations of everyday life on which reasonable and prudent men, not legal technicians, act.' (Brinegar v. United States, 338 U.S. 160, 175, 93 L. ed. 1879.)

Here the police officers observed two individuals with bundles marked as originating from a cleaning establishment at an hour of the morning when such enterprises are not open to the public. The area, as testified to by Officer Crosier, was one experiencing an increasing number of offenses, and the petitioners gave two different answers concerning where they acquired the articles in question. Under these circumstances we believe that reasonable

grounds existed for detention of petitioners pursuant to inspection of the nearby Leader Cleaners premises. We find that reasonable grounds for the detention did exist and therefore the seizure of the articles was constitutionally valid.

Defendants next argue that the indictment under which they were tried is defective on two grounds. First, they contend that the failure to specify the exact street address at which the offense occurred renders the indictment defective for failure to charge an offense since there are a large number of Leader Cleaner establishments in the county. In considering section 111-3 of our Criminal Code (Chapter 38 Ill. Rev. Stat.) which specifies the requirements of an indictment, information, or complaint, the Supreme Court held in the case of People v. Burns, 403 Ill. 407, 86 N.E. 2d 197 (1949) that where the place of commission is not an element of the offense, an indictment is sufficient to meet the constitutional requirement that an accused be advised of the nature and cause of the accusation against him where it stated that the offense was committed within the boundaries of a certain county. In the later case of People v. Blanchett, 33 Ill. 2d 527, 212 N.E. 2d 97 (1965), the court reaffirmed this constitutional position and further held that section 111-3 was satisfied where the county in which the offense was alleged to have been committed was stated, no street address being necessary. Again in People v. Reed, 33 Ill. 2d 535, 213 N.E. 2d 278 (1965), the court held that an indictment for burglary was not defective for failure to state a street address, where the county in which the offense was alleged to have been committed was stated. In sum, these cases stand for the proposition that an indictment does not fail to state an offense where the exact street address is not specified, provided the place of commission is not an element of the offense. The street address

of the burglarized premises is not an element of the offense of burglary as defined by section 19-1 (a). Therefore, the absence of a specific street address at which the offense is alleged to have been committed will not render an otherwise valid indictment defective. People v. Reed, 33 Ill. 2d 535, 213 N.E. 2d 278 (1965).

Defendants' second contention as to defect in the indictment is that the office of an indictment includes protection of the accused against subsequent prosecution for the same cause, and that possibility remains open so long as the indictment does not specify the street address of the burglarized premises. We see no reason to be apprehensive in this regard since a defendant may secure additional details concerning the alleged offense by motion for a bill of particulars in the first instance. Should he fail to do so, as was the case here, his protection against subsequent prosecution for the same cause is not lost. As was stated in People v. Petropoulos, 59 Ill. App. 2d 298 at 327, 208 N.E. 2d 323 (1965), affirmed 34 Ill. 2d 179, 214 N.E. 2d 765 (1966):

> Concern has been expressed in some of the cases . . . over the need to furnish details in an indictment in order to prevent double jeopardy. We feel that this need not be a problem, because almost every indictment complying with the statute would be adequate to meet this requirement. If in a rare case it were not, then the defendant could introduce the record or parol evidence of his former prosecution.

Finding no merit in the contentions of defendants on this appeal, we affirm the judgment of the trial court.

JUDGMENT AFFIRMED.

BURKE, J., and MC CORMICK, J., concur.

109 I.A. 2nd 476

53294

PERCY PANARSKY, Plaintiff-Appellee, v. RAMON PEREZ, Defendant-Appellant.	)	APPEAL FROM CIRCUIT COURT, COOK COUNTY. Honorable Daniel J. White, Magistrate Presiding.

MR. JUSTICE MURPHY DELIVERED THE OPINION OF THE COURT.

Defendant appeals from a $140 judgment entered in favor of plaintiff in an action for rent of an apartment leased by plaintiff to defendant.

The defendant-appellant has filed his brief, abstract and record and has complied with all statutory requirements and with the rules of this court. No appearance or brief was filed in this court by the plaintiff-appellee.

Where an appellee has not filed a brief in the reviewing court, the order or judgment which is the subject of the appeal may be reversed without consideration of the cause on its merits. Parkside Realty Co. v. License Appeal Comm., 87 Ill. App.2d 374, 231 N.E.2d 654 (1967); 2 I.L.P., § 560.

Pursuant to the foregoing rule, we have decided to reverse the instant judgment without consideration of the cause on its merits.

JUDGMENT REVERSED.

ADESKO, P.J., and BURMAN, J., concur.

Abstract only.